

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK**

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**DUDE T. BARTOLILLO,**

**Petitioner,**

**9:10-cv-1472  
(GLS/RFT)**

**v.**

**WILLIAM D. BROWN,**

**Respondent.**

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**APPEARANCES:**

**OF COUNSEL:**

**FOR THE PETITIONER:**

Dude T. Bartolillo  
Pro Se  
06-B-2546  
Eastern NY Correctional Facility  
Box 338  
Napanoch, NY 12458

**FOR THE RESPONDENT:**

HON. ERIC T. SCHNEIDERMAN  
New York State Attorney General  
New York Office  
120 Broadway  
New York, NY 10271

PRISCILLA I. STEWARD  
Assistant Attorney General

**Gary L. Sharpe  
Chief Judge**

**MEMORANDUM-DECISION AND ORDER<sup>1</sup>**

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<sup>1</sup> On January 4, 2012, the referral to Magistrate Judge Treece was rescinded for the purpose of disposing of the instant motion.

## **I. Introduction**

Petitioner *pro se* Dude T. Bartolillo brings this Petition for a Writ of *Habeas Corpus* pursuant to 28 U.S.C. § 2254, alleging that his current confinement in state custody is in violation of his federal constitutional rights. (Am. Pet., Dkt. No. 8.) In an Order dated March 10, 2011, Magistrate Judge Randolph F. Treece granted respondent's request to file a motion to dismiss addressing only the timeliness of Bartolillo's petition. (See Dkt. No. 12.) Pending is respondent's motion to dismiss. (Dkt. No. 15.) For the reasons that follow, respondent's motion is granted.

## **II. Background**

The parties' familiarity with the underlying record is presumed. For a full discussion of the relevant history, the court incorporates the factual recitations contained in the parties' submissions. (See Dkt. No. 15, Attach. 2 at 2-7; Dkt. No. 18 at 1-6.)

## **III. Discussion**

Respondent argues Bartolillo's petition is untimely as it was filed more than one year after his conviction "became final by the conclusion of direct review or the expiration of the time for seeking such review." (Dkt.

No. 15, Attach. 2 at 7 (quoting 28 U.S.C. § 2244(d)(1)(A)). In response, Bartolillo concedes his petition is time barred,<sup>2</sup> but nonetheless avers the court should review his “actual innocence” claim on the merits by applying equitable tolling. (See Dkt. No. 18 at 7-11.) However, with the exception of a conclusory assertion that he “acted with reasonable diligence in presenting his claim,” Bartolillo fails to prove—or even substantively address—his entitlement to equitable tolling. (See *generally* Dkt. No. 18; Dkt. No. 21 at 1-2); see also *Holland v. Florida*, 130 S. Ct. 2549, 2562 (2010) (establishing a “petitioner’ is ‘entitled to equitable tolling’ only if he shows ‘(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way’ and prevented timely filing.”) (internal quotations omitted)). Because Bartolillo has not demonstrated the requisite “extraordinary circumstances,” his request for equitable tolling is denied and respondent’s motion to dismiss is granted.<sup>3</sup>

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<sup>2</sup> In spite of Bartolillo’s concession, the court, after reviewing the parties’ submissions, concurs with respondent’s calculation of the accrual period and its conclusion that Bartolillo’s petition was untimely. (See Dkt. No. 15, Attach. 2 at 7-12.)

<sup>3</sup> Notably, Bartolillo’s alleged evidence of actual innocence consists of four affidavits of prospective witnesses. (See Dkt. No. 18 at 11, 15-22.) Setting aside the fact that two of the affidavits were filed by family members, and the other two establish, at best, the purported promiscuity of the victim the day after Bartolillo sexually assaulted her, the fact remains that all of this information was available during Bartolillo’s state court proceedings. More importantly though, none of the “new evidence” proves that “it is more likely than not that no reasonable juror would have found [Bartolillo] guilty beyond a reasonable doubt.” *Schlup v. Delo*, 513 U.S. 298, 327 (1995).

#### **IV. Conclusion**

**WHEREFORE**, for the foregoing reasons, it is hereby

**ORDERED** that respondent's motion to dismiss (Dkt. No. 15) is  
**GRANTED** and Bartolillo's amended petition (Dkt. No. 8) is **DISMISSED**;  
and it is further

**ORDERED** that the Clerk close this case; and it is further

**ORDERED** that the Clerk provide a copy of this Memorandum-  
Decision and Order to the parties by mail and certified mail.

**IT IS SO ORDERED.**

January 6, 2012  
Albany, New York

  
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Gary L. Sharpe  
Chief Judge  
U.S. District Court